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# THE JOURNEY FROM *BROWN V. BOARD OF EDUCATION* TO *GRUTTER V. BOLLINGER*: FROM RACIAL ASSIMILATION TO DIVERSITY

Harry T. Edwards\*

Fifty years ago, in *Brown v. Board of Education*,<sup>1</sup> the Supreme Court confronted a precise and straightforward question: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”<sup>2</sup> The Court’s answer was precise and straightforward:

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>3</sup>

I was only 13 years old when the Court rendered its judgment in *Brown* on May 17, 1954. I vaguely recall my mother telling me about Thurgood Marshall having won an important case at the Supreme Court, and I remember seeing his picture in the newspaper the next day. But I did not then understand the enormity of the decision. And it certainly never occurred to me that *Brown* would precipitate the

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1. 347 U.S. 483 (1954).

2. *Brown*, 347 U.S. at 493.

3. *Id.* at 495.

major changes in race relations that we have seen in the United States over the past 50 years.

In 1954, racial bigotry was firmly entrenched in our society. African Americans faced blatant discrimination in education, employment, housing, voting rights, public office, public accommodations, and interstate travel. *Brown* addressed segregation in public education, but the case was symbolically about so much more. The decision implicitly endorsed the idea that integration through racial assimilation would eventually cure racial bigotry.<sup>4</sup> And the Court was firm in concluding that “[t]he impact [of racial segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.”<sup>5</sup> This was a powerful statement about racial inequality in America. The crucial precept underlying the decision in *Brown* is simple: the law cannot be used to separate the races to the detriment of the minority. As the legislatures and courts have enforced this principle over the past 50 years, African Americans have gained opportunities and access — in employment, politics, public and private accommodations, housing, and travel — that were unheard of in 1954.

The great irony is that, although we have seen many advances in racial equality over the past 50 years, we have yet to find a cure for the problem that precipitated *Brown* — racial inequality in public education. The Court in *Brown* said that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>6</sup> Yet, in 2004, thousands of African-American students in inner-city schools are impoverished for want of a decent elementary and secondary education.<sup>7</sup> Poverty, racially

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4. Although not explicit in the language of the opinion, the most vocal opponents of segregation during this era drew a link between integration and the end of racial bigotry. And they conceived of integration as assimilation with the majority. Dr. Martin Luther King, Jr.’s 1963 “I Have a Dream” speech summed up the aspirations of those who fought for school integration in that era. Dr. King invoked the image of black and white children holding hands, in a world in which their race would no longer matter. See Martin Luther King, Jr., *I Have A Dream*, Address at the March on Washington for Jobs and Freedom (Aug. 28, 1963), available at The Martin Luther King, Jr. Papers Project, Stanford University, <http://www.stanford.edu/group/King/publications/speechesFrame.htm>.

5. *Brown*, 347 U.S. at 494 (quoting a finding of the three-judge district court in the underlying Kansas case).

6. *Id.* at 493.

7. See GARY ORFIELD & CHANGMEI LEE, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 20-21 (2004) (arguing that poor Black students in segregated schools tend to be taught by less experienced or unqualified teachers in deteriorated facilities, which lack key resources and demanding courses); see also Valena W. Plisko, The Release of the National Assessment of Educational Progress (NAEP) 2003 Trial Urban District Assessments of Reading and Mathematics (Dec. 17, 2003) (presenting data showing that urban standardized test scores are below national averages), available at [www.nces.ed.gov/commissioner/remarks2003/12\\_17\\_2003.asp](http://www.nces.ed.gov/commissioner/remarks2003/12_17_2003.asp); COUNCIL OF THE GREAT CITY SCHOOLS &

segregated housing patterns, and failed programs to force integration through busing, as well as inadequate funding, facilities, and teachers, have left these students without adequate educational opportunities.<sup>8</sup>

The history of racial inequality in higher education has been different, however. When I graduated from high school in 1958, African Americans were largely excluded from schools like Cornell University, where I attended college, and the University of Michigan, where I attended law school. There were fewer than a dozen African Americans at Cornell during the four years when I was there, and I was the only African American enrolled in the University of Michigan Law School when I graduated in 1965. The absence of African Americans was not for want of qualified candidates — we were simply unwelcome. However, beginning in the latter half of the 1960s, many colleges, universities, and professional schools adopted “affirmative action” programs that have gone a long way toward ensuring that African Americans have equal access to higher education.

In 2003, in *Grutter v. Bollinger*,<sup>9</sup> the Supreme Court addressed the issue of affirmative action in higher education. The Court held that “student body diversity is a compelling state interest that can justify the use of race in university admissions”<sup>10</sup> and found lawful an affirmative action program at the University of Michigan Law School designed to ensure “racial and ethnic diversity.”<sup>11</sup> The Court saw the pursuit of student body diversity as justified, because it prepares students for an increasingly diverse work force and society. The majority also tellingly noted that “it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>12</sup> Through the ideal of diversity, *Grutter* reaffirmed *Brown*’s commitment to racial equality.<sup>13</sup>

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THE COLLEGE BOARD, MAKING THE GRADE: A REPORT ON SAT I RESULTS IN THE NATION’S URBAN SCHOOLS (2001) (presenting data showing that urban SAT I scores are below the national average); COUNCIL OF THE GREAT CITY SCHOOLS & ACT, A DECADE OF ACT RESULTS IN THE NATION’S URBAN SCHOOLS 1990-1999 (2001) (presenting data showing that urban ACT scores are below the national average). See generally JONATHAN KOZOL, SAVAGE INEQUALITIES (1991) (chronicling the dismal condition of public schools in low-income urban and rural areas).

8. See Walter R. Allen & Joseph O. Jewell, *The Miseducation of Black America: Black Education Since An American Dilemma*, in *AN AMERICAN DILEMMA REVISITED: RACE RELATIONS IN A CHANGING WORLD* 169, 188-89 (Obie Clayton, Jr. ed., 1996).

9. 123 S. Ct. 2325 (2003).

10. *Grutter*, 123 S. Ct. at 2337.

11. *Id.* at 2332 (quoting *id.* app. at 120).

12. *Id.* at 2341.

13. In a companion case, *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), the Court held that, because the University’s use of race in its undergraduate admissions policy was not narrowly tailored to achieve the school’s asserted interest in diversity, the policy violated the Equal Protection Clause.

*Brown* and *Grutter* are landmarks in the evolution of race relations in the United States. Each case also dramatically highlights how the force of law can be an indispensable weapon in the quest for racial equality. Their holdings are quite different, however. *Brown* sought to foster equality through integration by prohibiting forced segregation on the basis of race; *Grutter* aims to foster equality by permitting forced racial integration to achieve diversity. It is noteworthy that, taken together, the two decisions mirror a major societal phenomenon: over the past 50 years, many African Americans have abandoned *assimilation* as a model of integration in favor of today's ideal of *diversity*. In other words, many African Americans have rejected the idea that they should "blend in" with the majority, choosing instead to value their distinct racial identity.<sup>14</sup>

In this Essay, I briefly journey from *Brown* to *Grutter*. Drawing upon my own personal and professional experiences, I reflect on racial equality and inequality in America over the past 50 years, and I ponder the consequences of the shift from racial assimilation to diversity as a means of achieving racial equality.

## I. PROGRESS AFTER *BROWN* AND THE NECESSITY OF RACE-CONSCIOUS ACTIONS

In thinking about the 50 years since *Brown*, it is important to be clear about one thing: American society could not have achieved meaningful progress in race relations without race-conscious actions.<sup>15</sup> Color-blind remedies could not cure race discrimination in America. It would be absurd for anyone to suggest otherwise. Before and shortly after *Brown* was decided, African Americans were largely excluded from the most preeminent universities. We were effectively barred

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14. In referring to "racial identity," I am aware that scholars have questioned the use of race as a conceptual category. See, e.g., PAUL GILROY, *AGAINST RACE: IMAGINING POLITICAL CULTURE BEYOND THE COLOR LINE* 11-53 (2000). As Anthony Appiah argues, one can subscribe to a racial identity without believing in the biological notion of race and without equating race with culture. See generally K. Anthony Appiah, *Race, Culture, Identity: Misunderstood Connections*, in K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 30-105 (1996). In the United States, African Americans have a racial identity in part resulting from ascription of such an identity by others and in part resulting from self-identification. A racial identity may encompass a variety of cultures and perspectives and evolve over time, since its formation is largely influenced by social, political, and economic circumstances. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 52-54, 137-44 (2d ed. 1994). But these complexities do not raise any serious doubt about the existence of a Black or African-American racial identity.

15. For a personal account of the significance of *Brown* and race-conscious policies to the generation of African Americans born around the time when the case was decided, see CHARLES J. OGLETREE JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN* (2004). For an interesting and provocative interpretation of *Brown*'s connection to the civil rights movement, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

from all but segregated practices in major professions. We held very few important political positions. We were denied employment on the basis of race and paid less for the work we did. We were denied access to recreational facilities, eating places, housing, hotels, and means of travel. We were told not to commingle with — much less date or marry — members of the majority race. We were denied full participation in major league sports. We were foreclosed from most roles on television and radio and excluded from mainstream news media, movies, and theater. We had no meaningful voice in America. In short, by dint of racial bigotry, African Americans were mostly insignificant participants in American society.

The “second-class” status of African Americans was attributable, in no small part, to the legacy of slavery. Slavery significantly fueled the deeply held belief of many Americans that African Americans were innately inferior. Even a century after emancipation, that belief had not been dispelled. Consequently, when *Brown* was decided, it was relatively easy for members of the majority to characterize bigotry against African Americans as judgments based on “merit,” rather than as invidious discrimination on the basis of race. Bigotry was entrenched and resistant to easy cure.

In plainly and simply insisting on equality for all, *Brown* set a standard for Congress, the courts, and the executive branch in their later quests to ban racial discrimination. In the decade and a half following *Brown*, major legislation was enacted to address long-standing problems of race discrimination in employment,<sup>16</sup> housing,<sup>17</sup> travel,<sup>18</sup> and public accommodations and facilities.<sup>19</sup> Three principal goals prompted these legislative actions: redress for past discrimination, equal opportunity without regard to race, and integration. The latter goal — integration — always has been the most

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16. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-2 (2000)).

17. Congress prohibited discrimination in housing in the Civil Rights Act of 1968, Pub. L. No. 90-284, tit. VIII, § 804, 82 Stat. 73, 83 (1968) (codified as amended at 42 U.S.C. § 3604 (2000)). In addition, the Supreme Court held in *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968), that the ban on discrimination in the formation of contracts contained in 42 U.S.C. § 1982 (2000), passed after the Civil War, was a valid exercise of Congress's power to enforce the Thirteenth Amendment's ban on slavery.

18. Title II of the Civil Rights Act of 1964 prohibited discrimination in public accommodations, including hotels. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. II, § 201, 78 Stat. 241, 243 (1964) (codified as amended at 42 U.S.C. § 2000a (2000)). The Supreme Court upheld Title II as a valid exercise of Congress's power to regulate interstate commerce in *Heart of Atlanta Hotel v. United States*, 379 U.S. 241 (1964).

19. In addition to Title II, Congress also passed the Civil Rights Act of 1968, Pub. L. No. 90-284, tit. I, § 101(a), 82 Stat. 73 (1968) (codified as amended at 18 U.S.C. § 245 (2000)), criminalizing the violent interference with a person's use of a public facility because of the person's race, color, religion, or national origin.

controversial.<sup>20</sup> Indeed, the meaning and desirability of integration has long been the subject of disagreement among African Americans. As the political stakes have evolved, the debates among Black intellectuals and political leaders have taken many guises and involved many notable participants, including Booker T. Washington, W.E.B. Du Bois, Marcus Garvey, James Weldon Johnson, Walter White, A. Philip Randolph, Bayard Rustin, Dr. Martin Luther King, Jr., Ella Baker, Roy Wilkins, Whitney Young, James Farmer, Malcolm X, Stokely Carmichael, and Angela Davis, to name but a few.<sup>21</sup> The seminal debates between Booker T. Washington and W.E.B. Du Bois at the start of the twentieth century highlight several of the principal issues.

During the Jim Crow era, Booker T. Washington called for investment in vocational training for Black workers, largely in separate Black schools, so that they could become economically self-sufficient. Washington believed that, "in all things that are purely social we can remain as separate as the fingers," emphasizing that "[t]he opportunity to earn a dollar in a factory just now is worth infinitely more than the opportunity to spend a dollar at the opera house."<sup>22</sup> Thus, he did not challenge the separation of the races that was imposed by law.

During the same period, W.E.B. Du Bois called for integration: he pressed for civil and political rights and the expansion of access to higher education for Blacks.<sup>23</sup> Du Bois famously believed that

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20. For example, some scholars have argued that, contrary to what the Court said in *Brown*, Black children in segregated schools did not suffer from a lack of self-esteem. See, e.g., ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 22 (1996). For more complete analyses of the effects of desegregation programs, see DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995); *SCHOOL DESEGREGATION IN THE 21ST CENTURY* (Christine H. Rossell et al. eds., 2002).

21. Scholars in various disciplines have chronicled and analyzed these debates. See generally BROOKS, *supra* note 20; HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL* (1967); JOY JAMES, *TRANSCENDING THE TALENTED TENTH: BLACK LEADERS AND AMERICAN INTELLECTUALS* (1997); STEVEN F. LAWSON, *CIVIL RIGHTS CROSSROADS: NATION, COMMUNITY, AND THE BLACK FREEDOM STRUGGLE* (2003); MANNING MARABLE, *BLACK LEADERSHIP* (1998); WILSON JEREMIAH MOSES, *THE GOLDEN AGE OF BLACK NATIONALISM, 1850-1925* (1978); KEVERN VERNEY, *THE ART OF THE POSSIBLE: BOOKER T. WASHINGTON AND BLACK LEADERSHIP IN THE UNITED STATES, 1881-1925* (2001); RAYMOND WOLTERS, *DU BOIS AND HIS RIVALS* (2002); Randall Kennedy, *Integration: An Interpretation*, in 1 MICROSOFT ENCARTA AFRICANA (Kwame Anthony Appiah & Henry Louis Gates, Jr. eds., CD-ROM, 1999).

22. BOOKER T. WASHINGTON, *UP FROM SLAVERY* 221-22, 224 (1901). For an account of the eighteenth and nineteenth century historical contexts that influenced Booker T. Washington's separatist positions, see SCOTT MALCOLMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 185-219* (2000).

23. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 89-110 (Modern Library 1996) (1903). It is interesting to note, in light of the journey from *Brown* to *Grutter*, that arguments about "integration" often revolved around access to higher education. For example, Du Bois's chapter, "Of Mr. Booker T. Washington and Others," in *The Souls of Black Folk*, focuses on the importance of university education. See *id.* at 43-61.

educated Blacks, the "talented tenth" of the race, were responsible for improving the condition of the entire race.<sup>24</sup> However, several decades later, when the political landscape had begun to shift in favor of integration, Du Bois expressed doubts about the power of integration alone to bring about true racial equality. He worried that the integration of educated Blacks into white society was creating not a responsible vanguard, dedicated to improving the plight of the mass of African Americans, but instead a self-interested class with no concern for racial justice.<sup>25</sup> Du Bois began increasingly to sense that "any planning for the benefit of American Negroes on the part of a Negro intelligentsia" would have to involve deliberate attention to the interests of the race as a group, through what he termed "organized and deliberate self-segregation."<sup>26</sup> He called on African Americans to build up and invest in the autonomous financial, educational, and cultural institutions within Black communities.<sup>27</sup> Nonetheless, for much of his career, Du Bois saw integration as the ultimate object of self-segregation: separatism, in his view, was a strategy that would enable "co-operation and incorporation into the white group on the best possible terms."<sup>28</sup>

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24. W.E.B. Du Bois, *The Talented Tenth*, in W.E.B. DU BOIS: WRITINGS 842, 842 (Nathan Huggins ed., The Library of America 1986) (1903).

25. W.E.B. Du Bois, *The Talented Tenth: Memorial Address*, 15 BOULÉ J. 3-13 (1948), reprinted in W.E.B. DU BOIS: A READER 347, 349 (David Levering Lewis ed., 1995) ("[M]y plan of training a talented tenth might put in control and power, a group of selfish, self-indulgent, well-to-do-men . . . without any real care, or certainly no arousing care, as to what became of the mass of American Negroes, or of the mass of any people.").

26. W.E.B. Du Bois, *A Negro Nation Within a Nation*, 42 CURRENT HIST. 265-70 (1935) [hereinafter Du Bois, *A Negro Nation Within a Nation*], reprinted in W.E.B. DU BOIS: A READER, *supra* note 25, at 563, 569. Recognizing the shifting political context, Du Bois noted, "Those of us who in that day opposed Booker Washington's plans did not foresee exactly the kind of change that was coming . . ." *Id.* at 565. See generally DAVID LEVERING LEWIS, W.E.B. DU BOIS: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919-1963, at 302-48 (describing Du Bois's break with the NAACP).

27. Du Bois, *A Negro Nation Within a Nation*, *supra* note 26, at 569.

28. W.E.B. DU BOIS, DUSK OF DAWN: AN ESSAY TOWARD AN AUTOBIOGRAPHY OF A RACE CONCEPT (1940), reprinted in W.E.B. DU BOIS: WRITINGS, *supra* note 24, at 549, 700. In truth, because he was a brilliant and complex man, it is difficult to characterize Du Bois's views:

Always a controversial figure, he espoused racial and political beliefs of such variety and seeming contradiction as to bewilder and alienate as many Americans, black and white, as he inspired or converted. Beneath the shifting complexity of alliances and denunciations, nevertheless, there was a pattern, a congealing of inclinations, experiences, and ideas, more and more inclining Du Bois to a vision of society that became, in contrast to the lives of most men and women, increasingly radical as he grew older, until the day came when the civil liberties maverick was supplanted by the full-blown Marxist.



Suffice it to say that the views of African Americans regarding the shape and effects of integration are complicated, involving shifting and sometimes overlapping positions. Generalizations are, therefore, hazardous. Nevertheless, I believe that some insights can be gleaned from my sense of the landscape over the past 50 years. When I was growing up, my clear impression was that integration was a crucial component of racial equality, and the aim of integration included much more than mere equal opportunity. I had the sense that many African Americans optimistically accepted the idea that integration would bring them into the "melting pot" in which all members of society blend into a single whole, and that this would eventually cure racial bigotry against Blacks. In other words, I was taught that, with integration, we would eventually "blend in" with the majority race.<sup>29</sup> Integration in these terms meant that most neighborhoods and schools would be visibly multiracial and all races would enjoy substantially equal prestige and incomes. Thurgood Marshall and Dr. Martin Luther King were our champions in pursuit of this *assimilationist* ideal.<sup>30</sup>

The melting-pot metaphor preceded *Brown*, first appearing in a 1908 play by Israel Zangwill depicting the assimilation of Jewish immigrants into American life.<sup>31</sup> The melting pot was a crucible in which the cultures of various immigrant groups would blend with the dominant Anglo-American culture. Recent studies by historians show that, from the late nineteenth century to the present, most immigrant groups have been able to accede to the status of "whiteness" even when those groups were, upon arrival in America, met with fierce prejudice, including bias drawing on the rhetoric of racial difference.<sup>32</sup>

Perhaps encouraged by the progress of other groups, and by the *Brown* decision, many African Americans carried the hope that, once we "blended in," we would no longer be seen as "Negroes," but, rather, merely as "Americans." But the nature of bigotry against African Americans was qualitatively different from bias faced by other

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29. It has been argued that one of the solutions to "the race problem" is biological race mixing or amalgamation — *i.e.*, the figurative "browning" of America, a gradual process whereby "we" would become so mixed that prejudice would become nonsensical or impractical. See Kennedy, *supra* note 21. This is not what I mean by "blending in."

30. Martin Luther King, Jr.'s famous "I Have a Dream" speech characterized integration as a version of the American Dream. He imagined a world in which his children would be judged by "the content of their character" rather than the "color of their skin." King, *supra* note 4.

31. ISRAEL ZANGWILL, *THE MELTING-POT* 184-85 (1909).

32. See, e.g., NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); MATTHEW JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* (1998); DAVID ROEDIGER, *THE WAGES OF WHITENESS* 133-63 (1991).

groups, even other racial minorities.<sup>33</sup> The hope of “blending in,” rather than integrating with others on our own terms, was a bit fanciful. And it had some perverse effects. Thus, for example, some African Americans turned against members of their own race who were “too” dark or whose hair was “too” nappy, because their visible differences made it all the more difficult for African Americans to “blend in.”<sup>34</sup> The simple truth is that the *assimilationist* model of integration never has worked on any large scale in America. African Americans always have been seen to be “different,”<sup>35</sup> even as we have earned rights in society. Indeed, even Blacks who came to this country as immigrants have had great difficulty joining the melting pot.<sup>36</sup>

In 1954, the entrenched racial bigotry against African Americans made any form of integration difficult. As a consequence, the transformative power of *Brown* was limited. That decision could not alone, without further initiatives and interventions, cure the epidemic of racial bigotry. As a result, race-conscious actions were adopted by the federal government to undo the legacy of pervasive racial discrimination.

Before any such programs were instituted, President Kennedy used the phrase “affirmative action” to refer to equal opportunity measures that would go beyond the mere prohibition of discrimination. A 1961 executive order issued by the President stated that “it [was] the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government.”<sup>37</sup> In establishing the obligations of Government contractors and subcontractors, the President announced, “The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or

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33. One need only revisit Gunnar Myrdal's seminal study on “the Negro problem” to be reminded of this point. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944). “The treatment of the Negro is America's greatest and most conspicuous scandal.” *Id.* at 1020.

34. Toni Morrison explores the perverse psychological effects of this dynamic in her novel, *The Bluest Eye*. See TONI MORRISON, *THE BLUEST EYE* (1970).

35. See generally NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 96-121 (1997).

36. Harvard sociologist Mary Waters has documented the ways in which Black West Indian immigrants successfully integrate economically into American society when they first arrive (initially following the same pattern as other immigrant groups), only to find that, over time, the realities of American race relations begin to interfere with their success. See MARY C. WATERS, *BLACK IDENTITIES: WEST INDIAN IMMIGRANT DREAMS AND AMERICAN REALITIES* 7-8 (1999).

37. Exec. Order No. 10,925, 26 Fed. Reg. 1977, 1977 (Mar. 6, 1961).

national origin.”<sup>38</sup> The Committee on Equal Employment Opportunity created by this order was an enforcement agency entrusted with the power to cancel contracts and debar contractors who were not in compliance with the nondiscrimination policy.

After the passage of the Civil Rights Act of 1964, President Johnson used the term “affirmative action” in Executive Order 11,246 on Equal Employment Opportunity,<sup>39</sup> which explicitly called for the head of each executive department and agency to “establish and maintain a positive program of equal employment opportunity for all civilian employees.”<sup>40</sup> The order also required federal contractors to take affirmative steps to recruit, hire, and promote more minorities.<sup>41</sup> In a commencement address at Howard University shortly before the executive order was issued, the President explained why he felt that strong measures were necessary to eradicate the effects of past racial discrimination:

You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please.

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair.

Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.<sup>42</sup>

Affirmative action, as envisioned by Presidents Kennedy and Johnson, went beyond the mere ban on racial discrimination — it included positive measures to achieve true equal opportunity.<sup>43</sup> The executive orders of Kennedy and Johnson explicitly linked such positive measures to the past denial of equal opportunities and the

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38. *Id.*

39. Exec. Order No. 11,246, 30 Fed. Reg. 12,319, 12,320 (Sept. 24, 1965).

40. *Id.* at 12,319.

41. *Id.* at 12,320.

42. Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

43. One legal scholar suggests that modern affirmative action may be rooted in race-conscious legislation aimed at helping Blacks reach equality in the Reconstruction era. See James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 388-92 (1988).

need to redress past discrimination, not to abstract values such as diversity.

The 1960s also saw universities begin to change their stance on racial equality in higher education. Educators finally recognized that the near-total exclusion of historically disfavored minorities from preeminent undergraduate, graduate, and professional school programs would be prolonged indefinitely in the absence of race-conscious solutions.<sup>44</sup> When I graduated from law school in 1965, less than 1% of all law students in America were Black, and over one third of Black law students were enrolled in all-Black schools.<sup>45</sup> Less than 2% of all medical students in America were Black, and three fourths of them were enrolled at two all-Black institutions, Howard University and Meharry Medical College.<sup>46</sup>

In 1965, Dean Erwin Griswold was reportedly concerned over the absence of African-American students at the Harvard Law School.<sup>47</sup> He sought to remedy this situation by launching a special summer program at historically Black colleges to interest African-American students in attending law school.<sup>48</sup> The following year, Harvard Law School employed an affirmative action program to ensure the admission of African Americans.<sup>49</sup>

Other law schools, including Michigan,<sup>50</sup> followed suit. And graduate and professional schools across the country began to take race into account in their admissions decisions, accepting qualified Black students even when they had test scores or grades that were lower than those of other admittees.<sup>51</sup> These policies were responsible for opening doors that had historically been closed to African Americans. Between 1967 and 1975, the percentage of Black law students climbed from less than 1% to 4.5%.<sup>52</sup> The percentage of Black medical students climbed from less than 2% to 6.3%.<sup>53</sup> It is clear that the prod of affirmative action was essential to breaking the

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44. See, e.g., Petitioner's Brief, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), available at 1977 WL 189744, at \*13.

45. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 5 (1998).

46. *Id.*

47. See *id.*

48. *Id.*

49. *Id.*

50. See Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 397 (2000).

51. BOWEN & BOK, *supra* note 45, at 7.

52. *Id.* at 5, 7.

53. *Id.*

pattern of excluding African Americans from preeminent law schools and medical schools and the choice opportunities that come with graduation from these educational institutions.

We cannot make sense of the past 50 years without understanding that, when *Brown* was decided, the situation was such that no significant gains in racial equality were possible save through conscious institutional efforts to promote racial minorities. And these institutional efforts came only in the wake of specific redress ordered by the courts with "do-it-now" mandates, legislation by Congress, and official acts of the executive branch. These legal mandates and institutional efforts were indispensable prods to progress. It would be fanciful to think otherwise.

Some people have opposed race-conscious remedies in the belief that the beneficiaries of such actions often gain positions that they have not earned and for which they are not qualified. This is a disingenuous view of American history. What history shows is that race-conscious remedies were invoked after *Brown* only when it became clear that color-blind actions would not effectively eradicate the patterns of racial bigotry in America. History also shows that, because of these race-conscious actions, countless African Americans have succeeded with great distinction in educational and employment situations that were formerly denied to Blacks.

## II. RACE-CONSCIOUS ACTIONS AND MERIT: SOME AUTOBIOGRAPHICAL INSIGHTS

When I entered the University of Michigan Law School in 1962, I was the only African American in my class.<sup>54</sup> At the time, before race-conscious remedies were employed, the few "Negroes" who succeeded in the majority world were seen as "different." We were seen as having made it *despite our race*. In other words, an African American who succeeded on merit was considered an *exception*, to whom the stereotype of inferiority did not apply. Even before affirmative action existed, merit was thought of as something that a *typical* Black person did not possess.

I graduated very high in my law school class, earning honors for academic achievement: Order of the Coif, Law Review, best-in-the-class awards, and a scholarship. Nevertheless, when I finished law school, I was rejected by numerous major law firms to which I applied. I interviewed with large firms in Chicago, Detroit, Los Angeles, San Francisco, and Washington, D.C., but I was told quite frankly by some of the partners that, despite my impressive record, the firm would not

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54. I discuss some of these experiences in more detail in Harry T. Edwards, *Personal Reflections on Thirty Years of Legal Education for Minority Students*, 37 MICH. L. QUADRANGLE NOTES 38 (1994) [hereinafter Edwards, *Personal Reflections*].

hire a Negro. In other words, *despite my qualifications* on the law firms' own measures of merit, I was rejected *because of my race*. It was only when my white mentor, a Michigan law professor, pressed on my behalf that I received a job offer from a major Chicago law firm.

In 1969 and 1970, students at the University of Michigan engaged in protests and demanded that the law school hire a Black faculty member. It was because of these protests that I was recruited to teach at Michigan in 1970. In 1975, I was invited to join the faculty at Harvard Law School under similar circumstances. In 1977, I was appointed to the Board of Directors of Amtrak, where I later was elected Chairman, because President Carter was determined to give qualified African Americans access to high government positions. And in 1980, I was appointed to the United States Court of Appeals for the D.C. Circuit, in part, because the Carter administration was determined to put more qualified African Americans on the bench.

If these institutions had not undertaken race-conscious interventions, I probably would not have achieved any of these professional advances. These were jobs from which African Americans traditionally had been excluded. Even with my qualifications, these employment opportunities only became available to me as a result of efforts that quite purposefully diverged from the way things had been done for a long time. And merit never has been an issue. By all objective measures of achievement, I have excelled at every stage of my career, as have countless African Americans of my generation.

Yet, merit has come to be characterized by some as a value that is compromised by race-conscious actions.<sup>55</sup> And some critics argue that race-conscious actions generate racial stigmas, which in turn instill a sense of inferiority in African Americans who are the beneficiaries of racial preferences.<sup>56</sup> I have always found these claims to be specious.

In my situation, for example, in the normal course of events, I would have been excluded from significant positions in society, despite my qualifications, because of my race. Therefore, it never crossed my mind to feel concern over accepting any of these positions when they became available. The fact that race may have played a part in the thinking of some of the persons who extended me offers was of no interest to me. So long as I was offered the positions on the same terms as similarly situated white candidates, I did not hesitate to take them. I wanted the same opportunities as my white colleagues, and I certainly was not going to pass up good positions because race may

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55. See, e.g., THOMAS SOWELL, *RACE AND CULTURE* 177 (1994) (arguing that minority-student beneficiaries of affirmative action are "mismatched" with competitive schools).

56. See, e.g., SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 116 (1990) ("[O]ne of the most troubling effects of racial preferences for blacks is a kind of demoralization, or put another way, an enlargement of self-doubt.").

have been a factor in the decisions to hire me. This would have allowed institutions that had denied African Americans opportunities in the past to continue those exclusionary practices in the future. And once I accepted a position, I worked with no thought other than to succeed. I refused to be "distracted by petty people and petty issues."<sup>57</sup> I knew my capabilities. And I was confident that, once the door of opportunity was opened, I would succeed. I was never impeded by "a sense of inferiority."

I have some well-meaning friends and colleagues who worry that I will demean my achievements if I acknowledge that I may have been given some opportunities because of my race. Their concerns, albeit born of kindness and loyalty, are naive. Race-conscious actions gave me opportunities that I otherwise would have been denied because of my race. My achievements could not have come without these opportunities.

Race-conscious remedies are only mischievous when they are employed mischievously. In the early days of affirmative action in higher education, for example, I saw many situations in which persons assigned to implement affirmative action did so with paternalistic motives and an air of condescension. They sometimes even recruited African-American candidates with questionable credentials, determined to prove that there were no qualified Blacks. In such circumstances, I have no doubt that some Blacks struggled with a "sense of inferiority" and some suffered for lack of any real support. These poorly conceived affirmative action programs and hostile environments also led some people to conclude that African Americans were routinely being given positions that they had not earned and for which they were not qualified. Unsurprisingly, given the entrenched history of racial bigotry in America, these exaggerated negative perceptions overwhelmed reality and, eventually, affirmative action came to be seen by many as invidious discrimination against whites who were allegedly better qualified.<sup>58</sup>

These resentful attitudes toward affirmative action, unfortunately, exacerbated the very racial hostilities that the programs were intended to cure. The net result was that African Americans who were the beneficiaries of affirmative action sometimes were labeled unqualified and unworthy.<sup>59</sup> Such conclusions often reeked of the worst days of racial bigotry and failed to recognize that race-conscious actions were absolutely essential to negate some of the worst effects of racism.

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57. Edwards, *supra* note 54, at 43.

58. See generally Harry T. Edwards & Barry L. Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975).

59. For a discussion of this phenomenon from an autobiographical perspective, see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 22-23 (1991).

While some may fault affirmative action for casting a cloud over the accomplishments of African Americans, I view that cloud as a remnant of the pathology that has long conflated racial bigotry with judgments about merit. And that pathology certainly did not (and does not now) justify abandoning affirmative action.

Fortunately, some of the problems seen in the early days of affirmative action found cures. There are now many people of high standing and good faith who are fully committed to racially integrated environments in both higher education and employment. In the recent past, their efforts have resulted in the adoption of high-quality affirmative action programs, which have been designed to select, support, and graduate or promote qualified African Americans. And lest anyone doubt the importance and success of quality affirmative action programs, one need only read the many amicus briefs — filed by universities, professional schools, educational associations, corporations, military officials, bar associations, student organizations, civil rights groups, and public officials — in support of the University of Michigan in the *Grutter* litigation.<sup>60</sup> Some very smart and highly committed people at Michigan and other institutions were determined to fight the charges of “reverse discrimination” and prove the great worth of affirmative action. They succeeded.

### III. “VALUING-OUR-IDENTITIES”

Perhaps in response to the many failed efforts to integrate public schools in the inner cities and, also, the countless (and often frustrating) legal and political battles over affirmative action, a major social phenomenon developed in the post-*Brown* era: the assimilationist model of integration lost favor with many African Americans. Most Blacks unhesitatingly embrace *Brown*’s rejection of separate-but-equal. And many Blacks, at least those not trapped in the underclass of society,<sup>61</sup> accept the initiatives inspired by *Brown* and enjoy the fruits of racial equality in higher education, employment, housing, recreation, travel, and politics. African Americans have no

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60. See *Grutter*, 123 S. Ct. at 2340, where the Court wrote:

The Law School’s claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”

*Id.* (citations omitted).

61. By “underclass,” I refer to the class of people whose lives are characterized by persistent poverty, joblessness, illiteracy, violence, and despair. See Christopher Jencks, *Is the American Underclass Growing?*, in *THE URBAN UNDERCLASS* 28, 28-30 (Christopher Jencks & Paul E. Peterson eds., 1991).



desire to turn away from the just results of equality. But, by the same token, many Blacks no longer seek integration through assimilation.

What we may be witnessing at the start of the twenty-first century is an acceptance by many African Americans of what I view as a "valuing-our-identities" approach that is radically different from the "blending in," assimilationist ideal with which I grew up. Our society has become a conglomeration of differences. We now look to gender, age, race, ethnicity, and religious differences — often with pride — to distinguish ourselves. Attempting to downplay these distinctive characteristics is often frowned upon, rather than encouraged, by one's peers. African Americans have learned that it is possible to blunt negative stereotypes that derive from characteristics that make them different by boldly parading those characteristics. What was formerly viewed as negative becomes positive. This trend first emerged during the same historical period that gave birth to affirmative action. The late 1960s saw the popularity of slogans such as "Black is beautiful," and "I'm Black and I'm proud," which deliberately attempted to transform Blackness from a historical emblem of social inferiority to a source of pride and cultural value. The popularity of the Afro hairstyle was one of a number of popular and powerful symbols of the critical stance toward past preoccupations with "blending in."

Today, African Americans, both young and old, embrace characteristics and cultural heritages that distinguish them from other groups. And even though they would not accept a societal mandate forcing racial separation, there are African Americans who elect to live apart from white society, especially in social realms. When given a choice, some African Americans choose proximity to other African Americans. Black churches remain popular among African-American Christians. Some upper-middle-class African Americans choose to buy homes in neighborhoods known to be populated by other African Americans — the Atlanta, Georgia suburbs, for example<sup>62</sup> — or to vacation with other African-American families — say, on Martha's Vineyard in Massachusetts.<sup>63</sup> In other words, there is something unique and comforting about being with members of your own race that draws some African Americans together.

At various universities, some African-American undergraduates, when given a choice, elect to live with other Black students.<sup>64</sup> I worry

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62. The gravitation of affluent African-American professionals toward certain suburbs in DeKalb County, Atlanta, is discussed in HENRY LOUIS GATES, JR., *AMERICA BEHIND THE COLOR LINE: DIALOGUES WITH AFRICAN AMERICANS* 199-206 (2004).

63. Acclaimed Black filmmaker Stanley Nelson's recent documentary, *A Place of Our Own*, chronicles Oak Bluffs, a Black summer resort community on Martha's Vineyard. *A PLACE OF OUR OWN* (Firelight Media 2004).

64. At Harvard, for example, an informal study showed that many Black undergraduates elected to live in three dorms that were geographically distant from the rest

about the implications of this when students cut themselves off from opportunities that would better ensure a full and rich educational experience. These self-selection tendencies remain a reality, however. Indeed, Black students who attend historically Black colleges and universities, such as Morehouse, Howard, and Spelman, often choose these schools when they have the option of attending other competitive colleges and universities.

The attitude that underscores this valuing-our-identities approach was aptly summed up by an African-American professional who explained her move to a predominantly Black Atlanta suburb: "We are not forced into segregated areas. At the same time, we can choose to live in predominantly African-American areas without sacrificing lifestyle, education, or traditional values."<sup>65</sup>

Although these examples suggest a separatist strain, the valuing-our-identities approach also embraces racial integration. Many African Americans who choose to integrate themselves in majority-white or mixed-race communities also value their distinct identities. *Integration* and *assimilation* are no longer synonymous. In the past, integration meant "blending in" with the white majority. It meant, for example, straightening one's hair and avoiding preoccupation with topics related to Blacks. Obviously, it is nearly impossible for most African Americans to hide the fact that they are Black, but in majority-white environments, many African Americans in the past tried to "blend in" by making their distinctive racial characteristics easy to ignore.<sup>66</sup> These tendencies have waned.

More African Americans now integrate on their own terms. When entering a majority-white or multi-race setting, they do not downplay their racial identity. Quite the contrary, the majority culture has adopted many elements of African-American culture, most notably in music, literature, and the visual arts. And African-American culture, history, and artistic expression have become accepted subjects of study in U.S. universities. In an undergraduate English class on twentieth-century American literature, a student is as likely to read Zora Neale Hurston or Toni Morrison as Thomas Pynchon or Philip Roth.

African Americans are not the only adherents of the valuing-our-identities approach. In the past, immigrant groups that could "blend

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of the dorms. These dorms were unpopular with most other students. While Blacks constituted 11 % of the student body, they constituted 24.6% of the residents of these three dorms. The university eliminated student choice of dorms in response to this perceived self-segregation. See *News and Views: Taking Steps to Curtail Black Student Self-Segregation at Harvard College*, J. BLACKS IN HIGHER EDUC., Spring 1997, at 14. Cornell, Wesleyan, and Brown have offered Black theme houses in which almost all residents have been Black. *Id.*

65. GATES, *supra* note 62, at 203.

66. Kenji Yoshino offers his own detailed account of this form of assimilation, which he calls "covering." See Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002).

in" more easily than Blacks chose to assimilate, viewing their culture of origin as something to hide or escape.<sup>67</sup> But today, even those who can "blend in" are choosing not to do so, seeing their distinct heritages as a unique source of pride, rather than shame.<sup>68</sup> Immigrant groups, Native Americans, religious minorities, gays and lesbians, and disabled persons are all demanding recognition of their distinct perspectives and cultures, as well as equal status as citizens. In short, as sociologist Nathan Glazer puts it, "We are all multiculturalists now."<sup>69</sup>

It is hardly surprising that many African Americans have abandoned the assimilationist model of integration. Pursuit of assimilation seems pointless to many, especially as history suggests that African Americans never will be seen as other than different in America. And, as the woman from Atlanta says, African Americans of means can now choose to live as they please "without sacrificing lifestyle, education, or traditional values."<sup>70</sup>

So what now? Leaving aside case-specific remedies for past discrimination and the thorny issue of reparations,<sup>71</sup> it appears that diversity has replaced assimilation as the guiding ideal in the quest for racial equality. The question is whether the ideal of diversity is sufficient to secure the gains that have been made in racial equality since *Brown*, and whether it is adequate to attend to the needs of

67. Indeed, this is what the melting pot metaphor was about. See *supra* text accompanying note 31.

68. See generally MARY C. WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* (1990).

69. GLAZER, *supra* note 35. Glazer argues that multiculturalism, understood as ethnic groups' celebration of their differences at the expense of the melting-pot ideal, is the price that America is paying for its reluctance to integrate African Americans into American society. See *id.* at 120.

70. GATES, *supra* note 62, at 203.

71. Claims for reparations are broader than case-specific remedies for racial discrimination. For example, minority persons who are subjected to racial discrimination in employment have various grounds of redress under existing statutes, such as Title VII. See, e.g., *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (allowing remedies for a Black man's claims of hostile work environment); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (providing relief, in a class action, to Black and Hispanic firefighters who challenged the city fire department's failure to promote on the basis of race); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that a hiring policy involving a high school diploma requirement had an unlawful disproportionate racial impact). Proponents of reparations, however, argue that "America owes a debt for the enslavement and segregation of African Americans," and that, in assessing this debt, "[t]here are very few meaningful distinctions between the claims presented on behalf of large classes of African Americans and small groups of identifiable victims of Jim Crow discrimination." Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 279, 319 (2003). The article by Professor Ogletree summarizes the arguments for reparations and responds to critics who contend that there is no viable cause of action for reparations.

African Americans who are now suffering as members of society's underclass.<sup>72</sup>

#### IV. THE DIVERSITY IDEAL

The Supreme Court first credited diversity as a societal goal in *Regents of the University of California v. Bakke*.<sup>73</sup> In *Bakke*, Justice Powell's plurality opinion noted that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."<sup>74</sup> The reason, Justice Powell explained, is that

[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

. . . The atmosphere of "speculation, experiment and creation" — so essential to the quality of higher education — is widely believed to be promoted by a diverse student body. . . . [T]he "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.<sup>75</sup>

Justice Powell presented diversity as an alternative to justifications for affirmative action that focused on past discrimination and inequality. In other words, in his view, the pursuit of diversity is independent of claims for redress for past racial discrimination. The *Bakke* notion of diversity views exposure to the various perspectives of our pluralistic nation as essential to the education of our leaders. In deriving the importance of diversity from the First Amendment value of "the robust exchange of ideas," Justice Powell echoed the classical liberal notion that exposure to the marketplace of ideas strengthens democratic decisionmaking and individual self-realization.<sup>76</sup>

Justice Powell cited Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*<sup>77</sup> to support the general proposition that a university has a First Amendment interest in making its own judgments, including the selection of its students. The *Sweezy* decision reversed the contempt conviction of a university professor who had

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72. See generally AN AMERICAN DILEMMA REVISITED: RACE RELATIONS IN A CHANGING WORLD, *supra* note 8; THE URBAN UNDERCLASS, *supra* note 61.

73. 438 U.S. 265, 312 (1978).

74. *Id.* at 311-12.

75. *Id.* at 312-13 (footnote omitted) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

76. This view is often associated with the political philosophy of liberal thinkers such as John Stuart Mill. See JOHN STUART MILL, ON LIBERTY 15-71 (Hackett Publishing Co. 1978) (1859).

77. 354 U.S. at 255 (Frankfurter, J., concurring).

refused to answer the New Hampshire attorney general's questions regarding the content of his lectures and his knowledge of the Socialist party.<sup>78</sup> In expounding on the importance of academic freedom and diversity in *Bakke*, Justice Powell quoted language from Justice Frankfurter's *Sweezy* opinion, stating:

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." <sup>79</sup>

Justice Powell did not indicate that Frankfurter's language was not his own. Frankfurter was himself quoting another source, the statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand in South Africa.<sup>80</sup> The conference opposed the South African government's proposal to impose racial apartheid in educational institutions.<sup>81</sup>

This digression casts a light on Justice Powell's exposition of "academic freedom." It is plausible to view racial equality as only incidental to Justice Powell's idea of diversity,<sup>82</sup> for he did explicitly note that diversity embraced more than race and ethnicity:

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background — whether it be ethnic, geographic, culturally advantaged or disadvantaged — may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.

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78. *Id.* at 235 (Warren, C.J.).

79. *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring)).

80. CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN AND THE UNIV. OF WITWATERSRAND, *THE OPEN UNIVERSITIES IN SOUTH AFRICA*, at iii, 11-12 (1957).

81. *Id.*

82. For example, Robert Post cites Justice Powell's quotation of the *Sweezy* language as evidence that Powell, in contrast to the *Grutter* majority, "conceptualized diversity as a value intrinsic to the educational process itself." Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59-60 (2003). Although Justice Frankfurter may not have been thinking of racial discrimination in the United States, it could not have been too far from his mind. In invoking the statement of the South African scholars, Justice Frankfurter noted:

It is also perhaps the most poignant because its plea on behalf of continuing the free spirit of the open universities of South Africa has gone unheeded.

....

I do not suggest that what New Hampshire has here sanctioned bears any resemblance to the policy against which this South African remonstrance was directed.

*Sweezy*, 354 U.S. at 262-63 (Frankfurter, J., concurring).

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.<sup>83</sup>

Nevertheless, it is telling that the language he used to define the ideal of diversity in terms of academic freedom originated in the South African resistance to racial apartheid.

We will never know with certainty all of what Justice Powell had in mind. It is fairly clear, however, that he saw diversity as a way of justifying affirmative action while avoiding the difficulties allegedly raised by the search for remedies for past racial discrimination — complaints about “preferential treatment” for minorities and the general confusion and dismay among whites over the scope of affirmative action. Indeed, citing the burdens placed on white applicants, the *Bakke* Court struck down the Davis Medical School’s affirmative action plan, explicitly rejecting the argument that the policy could be justified as a remedy for societal discrimination absent particular findings of constitutional or statutory violations.<sup>84</sup> In holding that some race-conscious policies might be justified by diversity, Justice Powell gave some hope to proponents of affirmative action. But his view was narrow: he valued racial and ethnic diversity only to the degree that it brought about a diversity of “experiences, outlooks, and ideas.”<sup>85</sup>

In the years since *Bakke*, diversity has gained increasing favor in American life, particularly with some members of minority groups. Diversity proponents value differences among groups and take pride in their distinct group identities. This is not to say that a group’s mere existence gives it entitlements or advantages over other groups. Rather, the point is that we live in an inclusive society. So each part of our community must have access to all that makes our society function. We look to include all, to ensure open access to all, to provide role models for all, and to enrich mutual efforts by embracing all perspectives. This approach embodies both the acceptance of the fact that people are different and a celebration of our plurality of perspectives as a valued source of knowledge. Consistent with Justice Powell’s *Bakke* opinion,<sup>86</sup> many of today’s proponents of diversity support not only racial diversity, but a diversity of cultures, religions, languages, abilities, life experiences, and viewpoints.<sup>87</sup> This cultural

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83. *Bakke*, 438 U.S. at 314 (footnote omitted).

84. *Id.* at 307-09.

85. *Id.* at 314.

86. Justice Powell noted: “Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.” *Id.*

87. See generally GLAZER, *supra* note 35; DAVID A. HOLLINGER, *POSTETHNIC AMERICA* (1995).

shift in values — away from assimilation and toward diversity — set the stage for the Court's decision in *Grutter*.

## V. *GRUTTER'S* DIVERSITY AND RACIAL EQUALITY

*Grutter* establishes diversity as the next milepost on the road to racial equality. In *Grutter*, the Supreme Court embraces diversity as a "compelling interest" sufficient to enable racial preferences in law school admissions policies to withstand strict scrutiny.<sup>88</sup> *Grutter* affirms *Bakke's* commitment to diversity in higher education. But, in so doing, the Court expands Justice Powell's ideal of educational diversity, articulating and affirming the essential role that diversity plays in American society generally:

These benefits [of diversity] are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle [sic] mission to provide national security."<sup>89</sup>

In articulating the importance of diversity to the experiences of American business and the military, *Grutter*, unlike *Bakke*, suggests a link between diversity and the ongoing quest for racial equality. *Grutter* cites *Brown* to establish the importance of equal educational opportunities to democratic citizenship:

This Court has long recognized that "education . . . is the very foundation of good citizenship." *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954). For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.<sup>90</sup>

The Court concludes that diversity permits the law school to maintain a path to leadership that is visibly open to all races and ethnicities.<sup>91</sup>

*Grutter* also departs from *Bakke's* implication that racial diversity can approximate the diversity of perspectives in American society. For the *Grutter* majority, diversity is a compelling reason to maintain race-conscious policies *not* because of a belief that different races possess

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88. *Grutter*, 123 S. Ct. at 2340-41.

89. *Id.* at 2340 (alterations in original) (citations omitted).

90. *Id.* at 2340-41.

91. *Id.* at 2341.

identifiably distinct perspectives, but because having a critical mass of students from different groups helps break down expectations that often are based on racial stereotypes.

The Law School does not premise its need for critical mass on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.” Brief for Respondent Bollinger et al. 30. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.<sup>92</sup>

When non-Black students interact with more than one African-American student, it is less likely that the views and characteristics of a single African American will be assumed to be representative of the entire race. The Court recognizes that diversity not only illuminates the differences *between* groups, but also the variety of perspectives *within* any single group. *Grutter* is consistent with *Bakke*, however, in rejecting affirmative action programs that entail racial quotas<sup>93</sup> or fail to provide for “individualized consideration” of competing applications.<sup>94</sup>

The *Grutter* majority’s suggestion of a time limit on the use of race to achieve diversity is somewhat perplexing. If diversity is a good thing, then it will remain so for as long as there are distinct groups in society. Yet, the majority opinion notes: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>95</sup> This time limit harkens back to the implication in *Brown* that integration through assimilation would eventually cure problems emanating from racial bias. As noted earlier, this is a doubtful proposition. But even if integration through assimilation were possible, the ideal of diversity implicitly challenges the desirability of a “blended” society, and the pursuit of diversity undermines the process of assimilation. Diversity involves awareness,

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92. *Id.*

93. Justice Powell’s opinion in *Bakke* rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. 438 U.S. at 307.

94. In the companion case to *Grutter*, the Supreme Court rejected Michigan’s use of race in its undergraduate admissions policy, in part, because the program did not involve “individualized consideration” of applications, as contemplated by *Bakke*:

We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program. . . . [T]he [University’s] automatic distribution of 20 points has the effect of making “the factor of race . . . decisive” for virtually every minimally qualified underrepresented minority applicant.

*Gratz v. Bollinger*, 123 S. Ct. 2411, 2427-28 (2003) (quoting *Bakke*, 438 U.S. at 317).

95. *Grutter*, 123 S. Ct. at 2347.



if not celebration, of relevant differences, including different racial identities. Thus, consciousness of race is an unavoidable part of the process of achieving diversity and the equality it is intended to foster.

In any event, *Grutter* situates diversity in the world that we have inherited, and this means tackling racial inequality. Thus, it is highly plausible that *Grutter* uses diversity as a proxy for redress against past racial discrimination.<sup>96</sup> And if the worst effects of racial bigotry are not cured in 25 years, the time limit can be extended.

*Grutter*, like *Brown*, is a major symbolic victory for proponents of racial equality: It makes it clear that African Americans must have a meaningful place in American society, and that we are not yet there. I think that a majority of the Court believed that renouncing the Michigan plan might trample the ideal of racial equality. They believed that there is still a need to take firm steps to achieve racial equality, whether through diversity programs or otherwise.

## VI. MOVING FORWARD

Diversity gives new content to the principles of equal opportunity and integration that underlie *Brown*. The affirmation of diversity in connection with racial equality should spur Americans to find cures for old wounds and, also, take prophylactic steps to ensure that the gains that we have seen in the past 50 years are not lost to shortsightedness in the future.

### A. *The Black Underclass*

First, there is no doubt that, because of the advances in racial equality since *Brown*, many African Americans are relatively well off. Unfortunately, this is only part of the picture. The present facts concerning the Black underclass are truly depressing. Rates of poverty, unemployment, and incarceration remain dramatically higher among African Americans than among other groups in America today. As the national poverty rate grew to 12.1% in 2002, the poverty rate for Blacks was 24.1%, as compared to 8% for non-Hispanic

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96. Robert Post recently made a similar point in the *Harvard Law Review* Foreword, *supra* note 82. Post suggests that the *Grutter* Court's endorsement of diversity was qualitatively different from Justice Powell's exposition in *Bakke*. *Id.* According to Post, Justice Powell's diversity rationale bore no relation to the actual reasons why affirmative action became prominent in American higher education, reasons based "almost entirely on the felt need to remedy deep social dislocations associated with race." *Id.* at 63. The *Grutter* Court "far more accurately identifies these reasons." *Id.* at 63-64. Post views *Grutter*'s account of diversity, which links it to the need to make the "path to leadership . . . visibly open to talented and qualified individuals of every race and ethnicity," *id.* at 61 (quoting *Grutter*, 123 S. Ct. at 2341), as evidence that "*Grutter* endorses the practice of affirmative action for university admissions in terms that closely correspond to the reasons that actually sustain the practice," *id.* at 65.

whites.<sup>97</sup> In a March 2004 survey, the national unemployment rate was 5.7%, with 10.2% of Blacks unemployed, as compared to 5.1% of whites.<sup>98</sup> The comparison of incarceration rates is even more astounding: 10.4% of Black men ages 25-29 are incarcerated, as compared to 1.2% of white men in the same age group.<sup>99</sup>

Many poor Black people live in urban areas that are largely segregated, though not by law.<sup>100</sup> Conditions are truly terrible in the worst of these inner-city neighborhoods. Chicago's Robert Taylor Homes, which was the largest public housing development in the country before being torn down by the City,<sup>101</sup> is a good example: one in five Black men in their twenties was in jail, in prison, or on parole; 69% of Black children were raised in single-parent households; the average life span of an African-American man was fifty-nine years; and only 45% of Black adults were working in any given week.<sup>102</sup>

The causes of the Black underclass are both "external" (the legacy of slavery, segregation, discrimination, poor systems of public education, and failed economic policy) and "internal" (the failure of some African Americans to take needed personal steps to avoid drugs, crime, unplanned pregnancies, and other self-destructive behavior that worsens their plight).<sup>103</sup> And, as Orlando Patterson notes, these causes are linked:

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97. BERNADETTE D. PROCTOR & JOSEPH DALAKER, *POVERTY IN THE UNITED STATES*:2002, at 2 (2003), available at <http://www.census.gov/prod/2003pubs/p60-222.pdf>.

98. Bureau of Labor Statistics, *The Employment Situation*: March 2004, at 1 (Apr. 2, 2004), [http://www.bls.gov/news.release/archives/empst\\_04022004.pdf](http://www.bls.gov/news.release/archives/empst_04022004.pdf).

99. Paige M. Harrison & Allen J. Beck, *Prisoners in 2002*, Bureau of Justice Statistics Bulletin, July 2003, at 9, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf>.

100. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (arguing that residential segregation is the main cause of Black poverty).

101. On its website, the Chicago Housing Authority notes:

Robert Taylor was considered the largest public housing development in the world when it was completed in 1962. With more than 4,300 units, this massive development occupied a two-mile long stretch of south State Street. The apartments were arrayed in a linear series of 28 16-story high-rises, which formed a kind of concrete curtain for traffic passing by on the nearby Dan Ryan Expressway. Most of these high-rises have been demolished, and the remaining buildings will be closed by 2005. By containing a large low-income population on an isolated site, the Robert Taylor property became a national symbol for the errant philosophy of post-war public housing.

CHICAGO HOUSING AUTHORITY, *ROBERT TAYLOR HOMES: HISTORY* (2003), at [http://thecha.org/housingdev/robert\\_taylor.html](http://thecha.org/housingdev/robert_taylor.html).

102. GATES, *supra* note 62, at 335.

103. ORLANDO PATTERSON, *RITUALS OF BLOOD: CONSEQUENCES OF SLAVERY IN TWO AMERICAN CENTURIES*, at viii (1998) [hereinafter PATTERSON, *RITUALS OF BLOOD*]. See generally ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* (1997) (critiquing liberals for focusing too much on external factors, and critiquing conservatives for focusing too much on internal factors).

The internal and external problems of the group are inextricably linked. For the purposes of analysis, we often focus on one or the other area and level of the causal net, but when people insist, as conservatives are wont to do, that only the proximate internal cultural and behavior factors are important ("So stop whining and pull up your socks, man!"), or as liberals and mechanistic radicals are inclined to do, that only the proximate external factors are worth considering ("Stop blaming the victim, racist!"), they are playing tiresome and obfuscating ideological games.<sup>104</sup>

Obviously, *Grutter* does not purport to address the problems of the Black underclass. Indeed, the ideal of diversity, as it is discussed in *Grutter*, is largely irrelevant to the significant number of African Americans who now suffer the worst effects of poverty, poor housing, crime-infested neighborhoods, unemployment, and low quality public education. For many such individuals, higher education is a distant dream. Although the Black-underclass issue is beyond the scope of this essay, it is not out of my thoughts. The subject is complicated and controversial, and, frankly, it raises questions that cannot be fully addressed here. But it would be irresponsible to applaud some of the advances in racial equality that we have seen over the past 50 years without acknowledging that the enormous class disparity affecting African Americans is dramatically worse than the class disparities affecting other groups in society.<sup>105</sup> This reflects an enduring and deeply troubling form of racial inequality that must be addressed in the years ahead.

### B. *Reevaluating Merit*

Second, the acknowledgments in *Bakke* and *Grutter* that diversity enhances educational quality caution against the use of mere numbers to measure merit. I am not suggesting that diversity points should replace test scores in evaluating students. But the diversity debate should remind us that there is a limit to what numbers can forecast about the things we value in people and education.

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104. ORLANDO PATTERSON, *RITUALS OF BLOOD*, *supra* note 103, at ix.

105. As noted earlier, the poverty rate for African Americans, at 24.1%, is three times greater than that for whites. See PROCTOR & DALAKER, *supra* note 97. The U.S. Census Bureau's statistics, dividing the population into fifths by income, show that for whites, the smallest raw number of persons occupy the lowest fifth. The raw numbers increase incrementally from one fifth to the next, with the largest raw number of whites in the highest fifth. For Blacks, the opposite is true. The largest raw number of Blacks occupy the lowest fifth, and the smallest raw number occupy the highest fifth. These figures show that there are relatively larger proportions of the white population in the middle, between the highest and lowest fifths, as compared to the Black population. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2003 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, TABLE HINC-05, at [http://ferret.bls.census.gov/macro/032003/hhinc/new05\\_000.htm](http://ferret.bls.census.gov/macro/032003/hhinc/new05_000.htm) (Nov. 13, 2003). Thus, one can infer that the income gap between rich and poor African Americans is greater than the gap between rich and poor whites.

Depending on what one is assessing, numbers can predict a lot or almost nothing. Yet, they are beguiling because they tend to carry a comforting aura of objectivity. In fact, the use of numbers does provide some objective measure of merit, one that was important to the opening up of elite universities in the United States. As Nicholas Lemann has documented, standardized tests enabled universities like Harvard to develop admissions policies that gave greater weight to ability and less to attendance at elite prep schools, hereditary wealth, and privilege.<sup>106</sup> Standardized tests admittedly played an important role in transforming higher education from a bastion of aristocracy to a major vehicle of upward mobility in America.

However, in the name of meritocracy, we now tend to attribute too much to numbers. We find it easier to rely on standardized tests than to develop fuller, fairer measures of potential and talent. Thus, for example, too many people readily assume that the difference of a few points on a standardized test says something meaningful about the relative merits of two law school applicants, even when both have achieved scores that demonstrate that they are up to the same educational challenge. Although standardized test scores are useful for determining whether a student possesses the skills necessary to enter a competitive learning environment, they do not assist in drawing meaningful distinctions between qualified individuals. Once a score establishes that an individual is in the zone of qualified candidates, other measures of potential, such as writing, references, and interviews, should carry real weight in the selection process. These measures give us a fuller picture of promising students.

Reliance on numbers, particularly on standardized tests, is troubling for another reason. Despite the origin of standardized testing in the pursuit of equal opportunity, the use of numbers to achieve meritocracy may now perpetuate, rather than undermine, the inheritance of class privilege. As some scholars have documented, the correlation between test scores and indicators of socioeconomic status is greater than the correlation between test scores and future academic and professional performance.<sup>107</sup> A recent study shows that even though many of the minority students admitted to the University of Michigan Law School from 1970 to 1996 had lower undergraduate

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106. See NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 7-9, 65 (1999).

107. See Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 149 (2003); see also Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 988 (1996) (noting that "[t]he correlation between family income and SAT is nearly four times larger than the incremental improvement in prediction offered by the SAT used in conjunction with high school grades"); Lempert et al., *supra* note 50, at 490 ("LSAT and [undergraduate] GPA, which in many law schools are the most prominent admissions screens, have almost nothing to do with our measures of achievement after law school. . .").

GPA's and LSAT scores than their white counterparts, they have not enjoyed less success in the legal profession. Whether measured by income, self-reported satisfaction, or public service, minority graduates enjoy professional success in equal or greater measure than their white peers.<sup>108</sup> Moreover, an entire industry devoted to preparation for standardized tests has shown that standardized tests are manipulable.<sup>109</sup> An expensive test-prep course is likely to raise a student's score and, as competition increases for places in elite colleges and professional schools, a few points can make the difference between acceptance and rejection. But those few points are not a good basis for comparing the potential of qualified, competitive candidates.

### C. *Expansion of Mentoring and Networking Opportunities*

Third, as we emphasize nonnumerical human factors, such as mentors' opinions, in comparing the academic and professional merits of qualified individuals, we need to be mindful of the effects of racial dynamics on the quantity, quality, and variety of mentoring relationships available to young African Americans. Mentoring and networking both significantly determine an individual's opportunities for success in school and employment.

My own educational and professional experiences are illuminating. When I was an undergraduate at Cornell, the late Professor Jean McKelvey, a preeminent teacher in the School of Industrial and Labor Relations and nationally acclaimed labor arbitrator, took me under her wing and pushed me hard to succeed. She not only taught me, encouraged me, and made me believe in myself while I was at Cornell, she also opened doors for me years later when I entered the arbitration profession.

When I was nearing graduation from Cornell, I could not decide whether to enter the military, go into the ministry, or do graduate work in academic administration. The late Professor Kurt Hanslowe, a prominent labor law professor who taught in both the undergraduate and law schools at Cornell, sat me down and explained to me why I should go to law school. He then helped me to decide where to apply, served as a reference (which no doubt enhanced my prospects with several outstanding law schools), and advised me on how to assess the schools that admitted me.

At Michigan Law School, I had the good fortune to serve as a research assistant for the late Professor Russell Smith, one of the top labor law scholars in the country. He was a wonderful mentor who, as I have already noted, used his immense influence to ensure my

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108. See Lempert et al., *supra* note 50, at 395.

109. See Guinier, *supra* note 107, at 148.

placement at an outstanding law firm upon graduation from law school.

My good fortune continued when I entered law practice. My mentor at the law firm was the managing partner. He took me very seriously and made it clear from day one that, although some of the partners doubted that a Black man could succeed as a labor law attorney for major corporations, he expected success. And he was true to his word. On one occasion, I had an uncomfortable exchange with a racist client. As a young associate, I was unsure how to handle the situation. I went to my mentor, explained the problem, and said that I did not want to continue serving the client. After listening to me, he said: "Oh, those folks are bad!" He then made it clear that I had two options: I could either continue with the client, in which case he would set matters straight, or I could drop the assignment and take some other work in its place. I opted for the latter. My mentor then reassigned the racist client to another young associate and gave me several new clients with whom to work. Anyone with any sensitivity will immediately understand how much my mentor's actions buoyed my spirits and confidence — he blamed the client, not me, for the breakdown in our relationship, and he gave me more and better work to replace the work that he reassigned. Later, when I received an offer to join the faculty at Michigan, I was reluctant to leave law practice. My mentor set me straight, telling me: "You would be crazy not to try law teaching. Accept the offer; if you do not like it, you will have a partnership waiting for you at the firm."

Finally, when I was being considered for the bench, a number of colleagues in the legal academic community played a huge role in promoting my candidacy for a position on the D.C. Circuit. And, after it was publicly announced that I was a serious candidate, William T. Coleman, Jr., the former Secretary of Transportation and one of the great lawyers in America, gave me the benefit of his wisdom, counsel, and friendship, which enabled me to find my way in Washington, D.C., during the appointment and confirmation processes.

My mentors were both white and African American, and they were *absolutely essential* to my professional development and accomplishments. Not only did they provide connections and advocate on my behalf at crucial moments in my young adult life, but, more important, they explained the system to me, nurtured me, and gave me the confidence to take on and complete challenging work.

The value of mentoring and networking is so obvious that it hardly warrants mention. Unfortunately, even to this date, African Americans do not benefit from mentoring and networking to the same degree as their non-Black peers. There are strong networks within African-American communities — through Black student associations, professional associations, fraternities, sororities, churches, and political organizations, as well as informal social interactions — but

there are not enough cross-racial networking opportunities for African Americans. This situation exists, in part, because of the state of race relations, which necessarily affects the social dynamics through which people find and become mentors. When I was in law school and in law practice, I did not have African-American mentors, because there were no Black professors on the faculty and no other minority attorneys in the law firm. As African Americans have joined law school faculties, law firms, and other professional enterprises, many have taken affirmative steps to counsel young African Americans who are on their way up. Nowadays, perhaps as a result of having available some African-American role models, it is not uncommon for Black students to seek out only African Americans for guidance. Likewise, it is not uncommon for many persons who are not African American to assume that the sole responsibility for mentoring young African Americans rests with senior members of the race.<sup>110</sup> Some whites benignly assume that their advice would not be welcome by young African Americans, especially when there are older African Americans available. More blameworthy are those who are reluctant to mentor African Americans, because of preconceived, unverified views of their qualifications.<sup>111</sup> Such misguided perceptions invariably reinforce the suspicions of some young African Americans that those professors and employers have no real interest in seeing them succeed.<sup>112</sup>

There is fault on both sides. Too many young African Americans assume the worst and thus fail to seek out non-Black mentors. And too many would-be mentors can be blind to their failure to treat all of their charges the same, without regard to race. All too often, foibles that are typical of any student or young employee are taken as a sign of a person's incompetence when committed by an African American.

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110. See Guinier, *supra* note 107, at 118-19 (noting that teaching and learning gaps disable professors from reaching out to mentor students of color). Psychological studies have noted the difficulties nonminority mentors face in providing feedback to students of color. See, e.g., Geoffrey L. Cohen & Claude M. Steele, *A Barrier of Mistrust: How Negative Stereotypes Affect Cross-Race Mentoring*, in *IMPROVING ACADEMIC ACHIEVEMENT: IMPACT OF PSYCHOLOGICAL FACTORS ON EDUCATION* 305 (Joshua Aronson ed., 2002); David A. Thomas, *Racial Dynamics in Cross-race Developmental Relationships*, 38 ADMIN. SCI. Q. 169, 189-90 (1993).

111. See David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 LAW & SOC. INQUIRY 527, 542-43 (2000).

112. A recent survey of undergraduates at the University of Michigan established that 46% of African-American seniors "feel that they have experienced some difficulty in 'being taken seriously academically — having professors think I am capable of doing quality work.'" JOHN MATLOCK ET AL., UNIVERSITY OF MICHIGAN, THE MICHIGAN STUDENT STUDY: STUDENTS' EXPECTATIONS OF AND EXPERIENCES WITH RACIAL/ETHNIC DIVERSITY 12 (2002), available at <http://www.umich.edu/~oami/mss/research/index.htm>. In contrast, only 21% of white and 30% of Asian-American and Latino students have experienced this difficulty. *Id.*

Serious consequences flow from these distortions. They limit the growth, development, and progress of individuals on both sides of potential mentoring relationships by causing them to withdraw from fruitful interactions with people different from themselves. They limit opportunities for truly worthy candidates. Occasionally, they may cause some African Americans to flounder unnecessarily due to feelings of insecurity. It is time for us to advance beyond these difficulties. People of all races in leadership positions need to make a greater effort to mentor students and employees different from themselves, and young African Americans need to be bolder and more broadminded in selecting their mentors and role models.

D. *Focus on Equal Opportunity in Primary and Secondary Education*

Fourth, we should take *Grutter's* suggestion of a 25-year limit on the use of race to achieve diversity as a prod to achieve meaningful improvement in the many troubled inner-city public schools throughout the country. History has shown that affirmative action in higher education is inadequate to solve some of the greatest barriers to racial equality, which include the problems of the African-American underclass. The integration of more advantaged African Americans in institutions of higher education has not improved the lot of the least advantaged African Americans, most of whom do not attend quality elementary and secondary schools. While giving a nod to the ideal of equality embodied in *Brown*, *Grutter* provides no relief for the unsolved and arguably intractable problem that was the subject of *Brown*: inequality in elementary and secondary public education.

No one seriously disputes that inner-city public education is generally poor.<sup>113</sup> And sociologists have noted that, since 1986, segregation in public schools has been rising.<sup>114</sup> Minority schools are highly correlated with high-poverty schools, which are also associated with low parental involvement, lack of resources, fewer experienced and credentialed teachers, and higher teacher turnover, all of which exacerbate education inequality for minority students.<sup>115</sup> More than half the Black students attending urban public schools fail to reach national proficiency standards on standardized tests in fourth and

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113. See, e.g., ORFIELD & LEE, *supra* note 7, at 20-21; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED 57-58 (1987).

114. See, e.g., ORFIELD & LEE, *supra* note 7; ERICA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS 5 (2002) (analyzing public school enrollment data collected by the U.S. Department of Education to conclude that since 1986, Black and Latino students have become more racially segregated from whites in almost every district examined).

115. FRANKENBERG & LEE, *supra* note 114, at 5.



eighth grades,<sup>116</sup> and dropout rates in the nation's largest urban school districts are twice the national average.<sup>117</sup>

There are no obvious legal solutions emanating from *Brown*, affirmative action, or *Grutter*, for the grossly unequal educational opportunities in primary and secondary schools available to the Black underclass. To the degree that the problems of inner-city schools are caused by poverty, federal constitutional law does not offer an obvious remedy. In *San Antonio Independent School District v. Rodriguez*,<sup>118</sup> the Supreme Court held that school funding schemes based on property taxes that disadvantage the poor did not violate the Equal Protection Clause. Holding that the poor do not constitute a suspect class,<sup>119</sup> and that education is not a fundamental constitutional right,<sup>120</sup> the Court declined to strike down policies disadvantaging the poor in public education. Because most of the legal solutions that purport to address the problems of primary and secondary schools cannot be characterized as remedies for equal protection violations of the sort identified by *Brown*, they tend to carry less weight in our constitutional scheme than the remedies of "integration" and "desegregation."<sup>121</sup>

Furthermore, even assuming that integration is the solution to the problems of our urban public schools, integration is not a viable option in many urban school districts. The simple truth is that, in many urban areas, relatively few white students attend racially integrated public schools.<sup>122</sup> Public schools in major cities are now

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116. NATIONAL CENTER FOR EDUCATION STATISTICS, THE NATION'S REPORT CARD: TRIAL URBAN DISTRICT ASSESSMENT, MATHEMATICS HIGHLIGHTS 2003, at 9-10 (2003), available at <http://nces.ed.gov/nationsreportcard/pdf/dst2003/2004458.pdf>; NATIONAL CENTER FOR EDUCATION STATISTICS, THE NATION'S REPORT CARD: TRIAL URBAN DISTRICT ASSESSMENT, READING HIGHLIGHTS 2003, at 9-10 (2003), available at <http://nces.ed.gov/nationsreportcard/pdf/dst2003/2004459.pdf>.

117. See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 274-75 (1999).

118. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

119. *Id.* at 28.

120. *Id.* at 35.

121. It should be noted, however, that, in the aftermath of *Rodriguez*, state courts have been the site of extensive litigation, based on state constitutional theories, over the equity and adequacy of school funding. In some states, litigants have been successful in obtaining legal remedies for inequitable or inadequate school funding. These cases have generally been litigated on the basis of state equal protection clauses (arguing that education is a fundamental right under the state constitution) or state education clauses, which typically impose an obligation on the state that some courts have held was not being met. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 893 (N.Y. 2003).

122. In Washington, D.C., for example, Black students constitute 84.6% of students enrolled in the largest central-city school district. In Detroit, Black students constitute 91% of the largest central-city school district. In Cleveland's largest central-city district, Black

overwhelmingly populated by minority students, whereas 30 years ago, many urban school districts had white majorities.<sup>123</sup> In the decades following *Brown*, more affluent white families moved to the suburbs,<sup>124</sup> where public schools are predominantly attended by whites and Asians.<sup>125</sup> The proliferation of private schools has also provided affluent urban families with an alternative to public schools. Through the use of vouchers, some states have attempted to offer poor children this same option. Although the Supreme Court recently upheld the voucher program in Cleveland,<sup>126</sup> such programs still raise state constitutional issues<sup>127</sup> and policy debates.<sup>128</sup> It is thus unclear whether the voucher solution is a fully effective or politically salable answer to the problems of inner-city primary and secondary schools.

Even desegregation remedies that seek to avoid city boundaries have been found legally wanting.<sup>129</sup> Mandatory busing has had only limited success, and it remains controversial.<sup>130</sup> And recent efforts to

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students constitute 71.3% of enrolled students. See ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 54 (2003).

123. FRANKENBERG ET AL., *supra* note 122, at 56-57.

124. WILSON, *supra* note 113, at 136.

125. The majority of students in most of the largest suburban school districts nationwide are white. However, there are exceptions, such as Prince George's County, Maryland, and DeKalb County, Georgia. See FRANKENBERG ET AL., *supra* note 122, at 62-63.

126. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

127. The principal constitutional problems involve state religion clauses, which typically have different wording and history and often are interpreted more broadly than the federal First Amendment, and other provisions drawn from state education clauses, which restrict legislative power. See, e.g., *Owens v. Colorado Cong. of Parents, Teachers and Students*, No. 03SA364, 2004 WL 1432407 (Colo. June 28, 2004) (striking down voucher program under a provision of the Colorado Constitution providing for local control of education); *Holmes v. Bush*, No. CV 99-3370, 2002 WL 1809079 (Fla. Cir. Ct. Aug. 5, 2002) (striking down voucher program under Florida's prohibition of public funding "in aid of" sectarian institutions), *appeal docketed*, No. 1D02-3160 (Fla. Dist. Ct. App.); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539 (Vt. 1999) (holding that the use of vouchers at sectarian schools would violate state constitutional prohibition on compelled support of religion).

128. One of the biggest issues is whether vouchers actually improve the achievement of students who receive them. The research to date is inconclusive. Paul E. Peterson has argued that vouchers improve Black children's educational performance. See WILLIAM G. HOWELL & PAUL E. PETERSON, *THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS* (2002). Others disagree. See, e.g., ALEX MOLNAR, *VOUCHERS, CLASS SIZE REDUCTION, AND STUDENT ACHIEVEMENT: CONSIDERING THE EVIDENCE* (2000). Another important issue is whether voucher programs undermine the public schools, which continue to educate most minority and inner-city children, by draining off resources and political support and making it impossible to achieve any real reform.

129. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (striking down cross-district busing in the Detroit area because the suburban jurisdictions had no legal responsibility for the previous segregation in Detroit).

130. See DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* 222-23 (1995); see also Alfred A. Lindseth, *Legal Issues Related to School Funding/Desegregation*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY*, *supra* note 20,

work around the problem have fared no better. In one case, a federal district court in Missouri attempted to address “white flight” by establishing a program allowing residents of suburban school districts to attend urban schools voluntarily. To attract white students who would otherwise attend suburban or private schools to the urban school district, the district court ordered the conversion of inner-city schools into magnet schools.<sup>131</sup> The Supreme Court struck down that plan in *Missouri v. Jenkins*, holding that the district court had exceeded what was necessary for the state to remedy the injuries of prior de jure segregation.<sup>132</sup>

Proponents of reform appear to be stuck “between a rock and a hard place” in searching for legal remedies to address the problems of our inner-city public schools. *Brown* has not led to equal educational opportunity for children whose only educational options are public schools in poor urban districts, and *Grutter* offers little hope for a useful legal remedy to cure the problem. Strong public policy initiatives will be the answer, if society can find the will to face the issue.

#### E. *Diversity: A New Model of Integration?*

Finally, we should reflect broadly on the ideal of diversity, beyond the conceptualizations that we have inherited from *Bakke* and *Grutter*. Diversity, understood through the valuing-our-identities approach, has the potential to reinvigorate the ideal of integration. Although the journey from assimilation to diversity has been long, the ideal of integration has not been lost along the way. Between *Brown* and the present, the valuing-our-identities ethos has reshaped the ideal of integration. It has empowered many African Americans to be who they want to be, without shame or apology. This should *enhance* interaction across groups and cultures — allowing all people to benefit from the different experiences of others. These different experiences do not always generate predictably distinct ideas, viewpoints, or perspectives. And they need not in order to be valuable. The desirability of different experiences and perspectives is their power to cast light on various nuances of human existence. It is difficult to predict the content of these perspectives or to quantify and describe their educational value with precision in advance. Nonetheless, my

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at 47 (noting opposition of white parents to mandatory busing); Christine H. Rossell, *Attitudes on Race and Desegregation*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY*, *supra* note 20, at 301 (noting that most Black parents do not support mandatory busing); Christine H. Rossell, *The Effectiveness of Desegregation Plans*, in *SCHOOL DESEGREGATION IN THE 21ST CENTURY*, *supra* note 20, at 93 (noting increase in white flight in reaction to mandatory busing).

131. *Missouri v. Jenkins*, 515 U.S. 70, 92-93 (1995).

132. *Id.* at 101-02.

experiences have convinced me of the great value, however unquantifiable, of collegial interactions with people whose backgrounds are different from one's own.<sup>133</sup> This is a broadly conceived diversity ideal that emphasizes not only difference, but, more important, dialogue. That is why it is ultimately an integrationist notion.

According to this new ideal of integration, persons who are different learn from one another by engaging in a dialogue made possible by mutual respect. Distinct identities confer dignity, not shame. "Blending into" the majority culture is not a condition of conversation. Nor is commonality of background a necessary predicate to community. In short, integration does not require assimilation, but can be born of a respectful and open exchange of ideas and opinions.

A broadly conceived diversity model of integration is here to stay, not only to visit for 25 years. As Justice Powell noted in *Bakke*, ethnicity and race need not forever remain the primary elements of diversity. Whether they do will be affected by the progress made in eradicating the remnants of racial bigotry. And ironically, as the *Grutter* majority recognized, the race-conscious pursuit of diversity may do the most to diminish the salience of race to the diversity ideal itself. With the entry of more African Americans into mixed-race environments, more and more non-Blacks will come to understand that there is no single African-American perspective. It will become clear that diversity *within* a group can be as rich and complex as diversity *between* groups.

Fifty years after *Brown*, it is apparent that the rejection of "separate but equal" was not enough to fully realize the ideal of integration. Nor were the strategies of assimilation or affirmative action. We can only hope that diversity, broadly conceived, will give the pursuit of integration new integrity and vitality in the years to come.

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133. See Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1666-70 (2003); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 329-30 (2002).